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IN THE
Supreme Court of the United States

OCTOBER TERM, 1964

No. 292

THE ATLANTIC REFINING COMPANY, *Petitioner*

v.

FEDERAL TRADE COMMISSION

No. 296

THE GOODYEAR TIRE & RUBBER COMPANY, *Petitioner*

v.

FEDERAL TRADE COMMISSION

On Writs of Certiorari to the United States Court of Appeals
for the Seventh Circuit

~~MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE~~
~~AND BRIEF AMICUS CURIAE OF~~
SHELL OIL COMPANY.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Shell Oil Company respectfully moves the Court for leave to file the attached brief *amicus curiae* for the reasons stated therein. All parties have given their consent in writing to the filing of this brief. It is filed at this time because it responds to views expressed by the Government in its brief filed on March 15, 1965.

Respectfully submitted,

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**BRIEF AMICUS CURIAE ON BEHALF OF
SHELL OIL COMPANY**

Shell Oil Company respectfully submits this brief *amicus curiae* because it is party to an appeal in a related case in the Court of Appeals for the Fifth Circuit (*Shell Oil Company v. Federal Trade Commission*, No. 18,967), and its position in that appeal may be prejudged by this Court if certain views expressed in the Government's brief filed in this case on March 15, 1965, are uncritically adopted. In submitting this brief, Shell neither discusses nor expresses any opinion on the merits of the instant appeal.

Nine years ago the Federal Trade Commission instituted three separate law suits challenging the use of the sales commission method for marketing tires, batteries and accessory items by three oil companies. *B. F. Goodrich Company and The Texas Company*, Docket No. 6485; *Goodyear Tire & Rubber Company and The Atlantic Refining Company*, Docket No. 6486; *Firestone Tire & Rubber Company and Shell Oil Company*, Docket No. 6487.*

These three cases were separately tried, separately decided at the hearing examiner level on the basis of the individual records in each case, and separately reviewed by the Commission, which issued separate opinions in each case.

* For the Hearing Examiner's Initial Decisions and the Commission's opinions and orders see *Goodyear Tire & Rubber Co.* (Atlantic Refining Co.), 58 F.T.C. 309 (1961); *Firestone Tire & Rubber Co.* (Shell Oil Co.), 58 F.T.C. 371 (1961); and *B. F. Goodrich* (The Texas Co.), 58 F.T.C. 1176 (1961) (remand by the Commission to the Hearing Examiner), after remand, Commission decision and order, Docket No. 6485, April 15, 1963.

The *Atlantic-Goodyear* opinion was reviewed and affirmed by the Court of Appeals for the Seventh Circuit, and that decision is now before this Court.

The *Texaco-Goodrich* opinion was reviewed and set aside by the Court of Appeals for the District of Columbia (*Texaco, Inc. v. Federal Trade Commission*, 336 F. 2d 754 (D.C. Cir. 1964)), and a petition for writ of certiorari has been filed, but not acted upon, in this Court (No. 635, October Term, 1964).

The *Shell-Firestone* opinion is presently on review in the Court of Appeals for the Fifth Circuit. At the time of the oral argument, the Fifth Circuit asked the parties to apprise the Court of any action taken in the judicial review of the other two cases; and the Fifth Circuit has since indicated that its decision will not be delivered until after this Court disposes of the instant appeals by Atlantic and Goodyear.

The Commission's order against Goodyear before this Court in the instant appeal is not confined to the Atlantic-Goodyear sales commission plan, but contains an unconditional prohibition against Goodyear having a sales commission arrangement with any other oil company. This sweeping order would, among other things, outlaw the sales commission agreement Goodyear has had with Shell for more than 25 years under which the parties currently market more than \$25 million of TBA merchandise each year. Shell's concern arises because the Government, in attempting to defend this broad order against Goodyear, takes a position, which if adopted in the manner stated, would prejudice in a material way the factual issues in the appeal now pending in the Fifth Circuit in the *Shell* case.

The Government in the instant case is forced to admit that "the Commission's opinion did not articulate the reasons for the scope of the [Goodyear] order" (Br. 74), but it attempts to save the broad order by arguing "(1) that the other oil companies with whom Goodyear had sales commission agreements had the same kind of economic power over their dealers as Atlantic; and (2) that in performing such agreements those companies did and were likely to do the same things that Atlantic had done in performing its contracts, with the same adverse effect upon competition." (Br. 74-75)

Of course, neither of the above propositions was the subject of adjudication in the *Atlantic-Goodyear* proceeding. Hence there is no substantial evidence on these points in that record; and neither the examiner nor the Commission made any such findings of fact. In its brief in this Court, the Government tries to support the propositions by "inferences" drawn from incidental testimony in the *Atlantic-Goodyear* record relating to other oil companies.

We submit that in passing on the scope of the Goodyear order it is inappropriate for this Court to adjudicate, for the first time (since neither the Commission nor the Court of Appeals undertook to do so), the legality of the sales commission arrangement between Goodyear and Shell: first, because the legality of that arrangement is the specific subject matter of another law suit presently pending review before the Fifth Circuit; and second, because the incidental evidence in the *Atlantic-Goodyear* record does not support the inferences asserted by the Government, particularly as they relate to Shell.

1. In the *Shell* proceeding, the Commission challenged the legality of both of Shell's sales commission plans—one with Firestone and the other with Goodyear. The allegations of the complaint related to both plans. In a trial lasting three years, the parties introduced substantial evidence on both plans, calling over 200 witnesses and introducing over 700 documentary exhibits. The testimonial transcript alone contains more than 6,000 pages. It is this gigantic record, consisting of 9 printed volumes, which is on review before the Fifth Circuit, where it has been already comprehensively briefed and orally argued before that Court.

In its *Shell* opinion, the Commission said that it was "concerned primarily with the sales commission contracts between Firestone and Shell and between Goodyear and Shell". (58 F.T.C. at 416). It specifically adjudicated the legality of both plans and issued a cease and desist order prohibiting their further use by Shell. It is this opinion and order that are on review before the Fifth Circuit.

In view of this situation, it would be manifestly unfair, as well as a denial of the due process requirements of the Administrative Procedure Act, for this Court to prejudge the legality of the Shell-Goodyear plan before the Fifth Circuit has had an opportunity to review the order, decision and record in the *Shell* proceeding. This Court has declined to pass upon administrative actions until the appropriate Court of Appeals has first completed its reviewing function. In *Federal Trade Commission v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960), this Court, after construing the meaning of the Robinson-Patman Act, refused to review the other issues raised on the appeal because "the Court of Appeals did not consider whether the record sup-

ported a finding of requisite competitive injury, whether respondent's good faith defense was valid, or whether the Commission's order was unduly broad." (*Id.* at 542). In remanding, this Court said that "we believe that it would be unwise for us to grapple with these intricate problems, a solution to which requires a careful examination of a voluminous record, before they have been dealt with by the Court of Appeals." (*Ibid.*)

2. The unfairness and dangers inherent in adjudicating the legality of a sales commission agreement on the basis of inferences drawn from fragmentary evidence in one proceeding where the very factual issue of the legality of the same agreement has been fully tried in another proceeding is illustrated by the arguments of the Government in its brief regarding the Shell-Goodyear plan.

On the question of the power oil companies other than Atlantic have over their dealers, the Government's brief quotes a generalized statement by an Atlantic official that "[p]ractically all the branded companies operate principally with lessee dealers". (Br. 75) Whatever its validity as to other oil companies, the implications of this statement do not apply to Shell: lessees are but one of five classes of Shell dealers. Shell uses a variety of leases, contracts and supply agreements with its dealers and distributors, but none of these agreements limits or in any way restricts TBA purchases. Nor does Shell restrict dealers' TBA advertising or product display or use of credit cards.

On the question of the performance of the sales commission agreements between Goodyear and oil companies other than Atlantic, the Government makes

several references to testimony purporting to show the practices under the Shell-Goodyear plan. These statements are inaccurate and misleading. The Government, for example, flatly states that Shell limits its credit cards to sponsored TBA. "Shell, Sinclair and Sherwood limit credit card purchases to sponsored products, a practice that results in compelling dealers—who recognize the importance of credit card sales—to carry sponsored TBA. . . ." (Br. 81-82) This statement about Shell, as the *Shell* record establishes, is indisputably wrong. We quote the Commission's own finding in its opinion in the *Shell* case: "Then, too, sponsored as well as non-sponsored TBA may be sold on Shell credit cards, including up to six months' extended credit without any charge to the motorist or the dealer." (58 F.T.C. at 402) *

The Government also refers to isolated portions of testimony of one former Shell salesman who testified in the *Atlantic-Goodyear* proceeding. (Since the witness is not identified by name, the references in the Government's brief, first at page 79 and then at page 81, may leave the impression that there were two such witnesses.) This same witness, Edwards, testified at great length in the *Shell* proceeding; on cross examination his testimony was thoroughly discredited;* and the Commission, in its *Shell* opinion, neither mentioned nor relied on his testimony.

* This is neither the time nor place to review the more than 150 pages of Edward's testimony establishing its unreliability, but we may give one example here. Edwards, who worked as a salesman for Shell over 12 years ago, openly admitted on cross-examination the inaccuracy of his prior testimony given before a Subcommittee of the House Small Business Committee, where he stated under oath that he had, as a Shell salesman, cancelled eight dealers who failed to purchase sponsored TBA. Asked about this testimony in the *Shell* case, Edwards said: "I testified to that, but that was wrong." Then he added: "I was excited." (Shell Record 670)

In its brief, the Government recognizes that all sales commission plans are not necessarily bad since the legality of an individual oil company's plan depends upon whether the oil company in fact possesses power to control its dealers and has exercised such power in carrying out the plan so as to adversely affect competition. (See Br. 36, 83) These are the very factual questions on review in the Fifth Circuit as to Shell's two plans with Firestone and Goodyear.

For the foregoing reasons, we submit that this Court, in passing on the scope of the Goodyear order, (1) should not prejudge the basic factual issues present in the *Shell* case now on review before the Fifth Circuit regarding Shell's relationship with its dealers and its performance under its sales commission plans with Firestone and Goodyear and (2) should in no event affirm the Goodyear order insofar as that order prohibits the continuation of the Shell-Goodyear sales commission arrangement.

Respectfully submitted,

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